

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
POLYCELL COMMUNICATIONS, INC. ) File No. 0000838367  
Request for Waiver and Extension of the )  
Broadband PCS Construction Requirements )  
)

ORDER

Adopted: June 21, 2002

Released: June 24, 2002

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. In this Order, we address a request by Polycell Communications, Inc. (Polycell) for waiver and extension of time to meet the construction requirements for one of its broadband Personal Communications Services (PCS) licenses.<sup>1</sup> For the reasons set forth below, we deny the request and notify Polycell that its license automatically terminated on April 28, 2002.

2. On April 28, 1997, the Commission granted Polycell the F-Block PCS authorization in the Oil City, PA Basic Trading Area (BTA328) (Oil City BTA).<sup>2</sup> Pursuant to section 24.203(b) of the Commission’s rules, 10 MHz broadband PCS licensees, which includes F-Block licensees such as Polycell, are required to provide service to at least one-quarter of the population of their BTAs or make a showing of substantial service within five years of initial license grant.<sup>3</sup> Failure to comply with this construction requirement results in automatic termination of the license.<sup>4</sup> Based on its original grant date, the five-year deadline for the instant license was April 28, 2002. On April 5, 2002, Polycell filed the instant extension request, asking for an additional six months (*i.e.*, from April 28, 2002 to October 28, 2002) to meet the five-year construction benchmark for this license.<sup>5</sup>

3. The record indicates that Polycell did not meet either construction benchmark set forth in section 24.203(b) of the Commission’s rules.<sup>6</sup> Therefore, Polycell’s license automatically terminated as of the April 28, 2002 construction deadline for failure to meet the construction requirement unless an extension of time to meet, or waiver of, the PCS construction rule is granted. Pursuant to sections 1.946(e) and 24.843(b) of the Commission’s rules, an extension of time to meet the construction requirements may be granted if the licensee timely makes the request and demonstrates that the failure to

<sup>1</sup> See File No. 0000838367 (Extension Request).

<sup>2</sup> The license was issued under call sign KNLH392.

<sup>3</sup> 47 C.F.R. § 24.203(b).

<sup>4</sup> *Id.*

<sup>5</sup> Extension Request at 1.

<sup>6</sup> See, generally, Extension Request.

complete construction is due to causes beyond its control.<sup>7</sup> The Commission has also stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.<sup>8</sup> Pursuant to section 1.925 of the Commission's rules, waiver may be granted if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>9</sup>

4. As explained herein, we find that the record does not support grant of an extension or a waiver of the broadband PCS construction rule to give Polycell additional time to meet the construction requirements for this license. Polycell first argues that an extension is warranted because "construction efforts are well underway," including retention of a consulting group, proposal and tentative acceptance "in principal" of an initial system design, identification of potential lessors and review of those lessors' standard lease documents, and agreement upon equipment acquisition.<sup>10</sup> While we recognize that Polycell has taken some initial steps toward constructing a PCS system, these few actions do not demonstrate the level of diligence expected of a licensee in meeting the construction requirements for its license, especially if it has held the license for the entire license period, as Polycell has with this license. In fact, we note that, even one month before the deadline, it appears that Polycell had not secured either a final equipment order nor specific sites to construct a network in this market.<sup>11</sup> Moreover, Polycell has not identified any causes beyond its control (or even within its control) that prevented it from meeting either construction benchmark, nor has it identified any circumstances that are unusual or unique compared to those of other PCS licensees, many of which have constructed systems in a much shorter time period than five years. Therefore, we dismiss Polycell's assertion that its efforts prior to its request support an extension or waiver of the PCS construction requirement for its license in the Oil City BTA.

5. Polycell also argues that an extension is in the public interest because it is a small business that is committed to providing PCS service to underserved rural areas. However, as mentioned above, it appears that Polycell has done very little in the five years of holding the license toward constructing a PCS network in this market. Moreover, nothing in the record supports Polycell's claim that it intends to provide service to underserved rural areas within the Oil City BTA. We are not inclined to grant a waiver based on a general statement of the licensee's intent to serve particular areas when it has done little toward constructing anywhere within its licensed area.

6. We are similarly not persuaded by Polycell's argument that the market may go unserved for several years if no extension is granted because the Commission would need to re-auction the license and

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<sup>7</sup> See 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) includes examples of specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>8</sup> See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd. 4957, 5019 (1994), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>9</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to 47 C.F.R. § 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>10</sup> Extension Request at 1.

<sup>11</sup> In cases where an extension of time has been granted, the licensee has often taken "significant steps" toward constructing its network, including, at a minimum, ordering equipment well in advance of the deadline. See, e.g., *American Wireless, LLC Request for Extension/Waiver of Personal Communications Services (PCS) Build-out Requirement*, *Memorandum Opinion and Order*, 15 FCC Rcd. 11025 (WTB Comm. Wir. Div. 2000) (licensee ordered equipment 2½ months prior to the deadline).

give the new licensee five years to meet the construction benchmark while Polycell could construct and provide service faster.<sup>12</sup> First, our records indicate that all three counties that comprise the Oil City BTA are currently served by two cellular carriers and, in part, by a digital SMR carrier.<sup>13</sup> While the Commission, to the extent possible, encourages multiple wireless carriers in an area in order to promote vigorous competition, the record in this case does not support the grant of a waiver of the PCS construction rule for a licensee that has neither acted with a sufficient level of diligence nor demonstrated any unique or unusual circumstances impeding its efforts. Second, *any* licensee that is requesting an extension for a period less than that given to meet the construction benchmark could make the same argument, and grant of a waiver on this basis alone would effectively undermine the construction rules adopted by the Commission.

7. Finally, we dismiss Polycell's argument that it is inappropriately subject to both a five-year and a ten-year construction requirement, unlike licensees in other wireless services that only have a ten-year requirement or have a less stringent benchmark to meet.<sup>14</sup> We note as an initial matter that broadband PCS F-block licensees do not have both a five-year and a ten-year construction requirement, only a five-year requirement.<sup>15</sup> Second, Polycell is essentially arguing that the construction requirements for all broadband PCS licensees should be modified to mirror those imposed on other wireless licensees. This argument, however, would have been more appropriately raised in a petition for rulemaking. Moreover, Polycell fails to provide any reasons why the PCS construction requirements cannot be met, are inappropriate, or are overly burdensome for *all* PCS licensees. In fact, we note that, to date, the vast majority of PCS licensees whose deadlines have passed have notified the Commission that they have met their construction requirements. Furthermore, to the extent that broadband PCS licensees do have different construction requirements from licensees in other wireless services, the Commission has, when adopting specific construction requirements, taken into account various factors relevant to the particular spectrum in question, including the predicted likely use of the spectrum (*e.g.*, fixed vs. mobile wireless use)<sup>16</sup> and whether the spectrum is heavily encumbered.<sup>17</sup>

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<sup>12</sup> Extension Request at 4.

<sup>13</sup> We also note that two other PCS licensees in the Oil City BTA – one of which is deemed a designated entity as a small business – have indicated to the Commission that they have constructed PCS systems in the BTA that cover more than 25 percent of the market's population. *See* File No.0000594020 (the C1 Block licensee, Devon Mobile Communications, L.P., states that it was providing coverage to 52.93% of the population as of September 17, 2001) and File Nos. 0000868711, 0000868714 (the D- and E-block licensee, AT&T Wireless PCS, LLC, notified the Commission that it was providing coverage to 34% of the population as of April 28, 2002).

<sup>14</sup> Extension Request at 5.

<sup>15</sup> As noted above, F-block licensees are only required to meet a five-year construction benchmark of 25% population coverage or substantial service. *See* 47 C.F.R. § 24.203(b).

<sup>16</sup> In some circumstances where there was no clear indication what the spectrum would be used for, the Commission established a more flexible construction requirement – for example, requiring the licensee demonstrate that it has provided substantial service by the end of its license term. *See, e.g.*, In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service, CC Docket No. 92-297, *Second Report and Order*, 12 FCC Rcd. 12545, 12659 (1997) (“Without knowing the type of service or services to be provided, it would be difficult to devise specific construction benchmarks.”)

<sup>17</sup> Incumbency can affect the actual benchmark (*e.g.*, 800 MHz EA Upper 200 channels have a channel capacity requirement) or the amount of time to meet the benchmark (*e.g.*, 700 MHz Band). *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket 93-144, *First Report and Order*, 11 FCC Rcd. 1463, 1529 (1995); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd. 476, 505 (2000).

8. Based on the foregoing, we find that Polycell's situation neither meets the standard for an extension of time nor warrants a waiver of the PCS construction rule. Therefore, we deny Polycell's request and note that Polycell's license for the F-block authorization in the Oil City BTA automatically terminated on April 28, 2002, pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules.<sup>18</sup>

9. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Polycell Communications, Inc. on April 5, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
Deputy Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>18</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2). Because nothing in the record indicates that Polycell currently has subscribers in the Oil City BTA, we find no need to issue interim authority to allow Polycell to continue operations in order to transition subscribers to other providers.